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In The

Supreme Court of the United States

EDWARD DiLORETO,

Petitioner,

v.

BOARD OF EDUCATION OF THE DOWNEY UNIFIED SCHOOL DISTRICT, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED

1. Whether a public school district created a "limited public forum" by opening the baseball field fence at a public high school to advertisements and in so doing, whether a public school district may discriminate against an advertisement listing the Ten Commandments consistently with the free speech clause of the First Amendment of the United States Constitution?

2. Whether a public school district's discrimination in excluding an advertisement listing the Ten Commandments from a public high school baseball field fence because of its religious content is an unreasonable restriction on speech under the free speech clause of the First Amendment to the United States Constitution, regardless of whether the school district created a "limited public forum" or a "nonpublic forum"?

3. Whether a public school district's discrimination in excluding an advertisement listing the Ten Commandments from a public high school baseball field fence because of its religious content is impermissible "viewpoint-based" discrimination under the free speech clause of the First Amendment of the United States Constitution?

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II. OPINION BELOW

The opinion below was filed by the United States Court of Appeals for the Ninth Circuit on November 8, 1999. The Court's opinion in *DiLoreto v. Board of Education of the Downey Unified School District* is reported at 196 F.3d 958 (9th Cir. 1999).

III. STATEMENT OF JURISDICTION

Edward DiLoreto originally filed this action in the Superior Court of the State of California for the County of Los Angeles alleging violations of his state and federal guarantees to the right of free speech and the free exercise of religion under the First Amendment of the United States Constitution, and applicable provisions of the California Constitution. Respondents removed this action to the United States District Court for the Central District of California pursuant to 42 U.S.C. section 1441(b). The District Court had original jurisdiction over this action as an action arising under the laws and Constitution of the United States pursuant to 42 U.S.C. section 1441.

The District Court, the Honorable Carlos Moreno presiding, granted respondents Edward Sussman, Betty Ferraro and Margo Hoffer's (collectively "respondents") Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure ("FRCP"). [Excerpt of Record ("ER") pp. 303-322; Docket No. 39]. Mr. DiLoreto filed a timely appeal to the United States Court of Appeals for the Ninth Circuit.

On November 8, 1999, the United States Court of Appeals for the Ninth Circuit entered an order and filed a written opinion affirming in part, and vacating in part, the District Court's order granting respondents' motion for summary judgment. *DiLoreto v. Board of Education*, 196

F.3d 958 (9th Cir. 1999). Petitioner Edward DiLoreto petitions this Court for writ of certiorari under Rule 11 of the Rules of the Supreme Court of the United States.

IV. CONSTITUTIONAL PROVISIONS INVOLVED IN CASE

This case involves the right to free speech and free exercise of religion under the First Amendment to the United States Constitution, as applied to state and local governments by the due process clause of the Fourteenth Amendment to the United States Constitution.

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. Amend. I.

V. FACTUAL AND PROCEDURAL BACKGROUND

A. Statement of Facts

This case arises out of a solicitation by Downey Unified School District to Petitioner Edward DiLoreto ("Mr. DiLoreto" or "Petitioner"), an 85-year-old businessman in Downey, California. On December 26, 1995, Mr. DiLoreto was solicited by the Downey High School Baseball Booster Club for a donation to help purchase and fund improvements for the baseball field at Downey High School ("Downey Field"). [See Separate Statement of Uncontroverted Facts and Conclusions of Law ("SUF") ¶ 8, E.R. at 151-168.] As part of a new program at Downey High, the club would produce and erect an

advertisement on a four foot by eight foot sign for Mr. DiLoreto on the Downey Field fence in return for a $400 donation. (SUF ¶ 8, E.R. at 155.)

Mr. DiLoreto submitted artwork to Downey High School Baseball Booster Club ("Booster Club") member Mark Sheldon that listed the Ten Commandments for printing on the sign he had purchased. (SUF ¶ 10, E.R. at 156.)

Mr. Sheldon brought Mr. DiLoreto's proposed artwork to Downey High School Baseball Coach Dan Bryan ("Coach Bryan") because of the religious nature of the sign. (SUF ¶ 13, E.R. at 157.) Coach Bryan informed Mr. Sheldon that he would have to get approval of the artwork submitted by Mr. DiLoreto. (SUF ¶ 13, E.R. at 157) The artwork was submitted to Downey High School principal Allan Layne, who then denied the proposed artwork for posting on an advertising sign because of its religious content. (SUF ¶ 17, E.R. at 158.) In January 1996, Mr. Sheldon assisted Mr. DiLoreto in obtaining approval of the sign by Mr. Layne by suggesting a sign with similar content, which was less wordy. (SUF ¶ 16, E.R. at 157) Once again, Mr. Layne refused to allow the sign's posting because of its religious content. (SUF ¶ 17, E.R. at 158.) Mr. Layne's decision to refuse Mr. DiLoreto's sign was eventually ratified by the School District, Superintendent Edward Sussman and the school board. (SUF ¶ 20, E.R. at 159.)

On March 14, 1996, Mr. DiLoreto had a conversation with Dr. Sussman, who informed Mr. DiLoreto that school officials were concerned about a possible lawsuit should the sign be erected. (SUF ¶ 36, E.R. at 164.)

Mr. DiLoreto next sought to secure a legal opinion from the Attorney General for the State of California,[1] and on September 13, 1997 Mr. DiLoreto received an official opinion from Attorney General Dan Lungren that stated in part:

> If a school district sells commercial advertising space on a fence surrounding its high school baseball field, it may not refuse to accept an otherwise appropriate advertisement which contains the Ten Commandments and clearly identifies the advertising party.

79 Op. Cal. Atty. Gen. 196 (1996).

On September 25, 1996, Mr. DiLoreto, retired California Superior Court Judge Harry Shafer, and others, met with Dr. Sussman, School Board President Ms. Ferraro, and Board Member Ms. Hoffer. (SUF ¶ 22, E.R. at 159.) Mr. DiLoreto alleged that at the meeting, all present agreed that the sign would be permitted and posted at the ball field. (Complaint at 4-5, ¶ 16, E.R. at 4-5.) Respondents denied this allegation. (Defendants' First Amended Answer to Plaintiff's Complaint, ("Answer") at 4, SUF ¶ 16, E.R. at 109). The following day, Mr. DiLoreto sent Dr. Sussman a confirming memoranda outlining the details of the agreement. (SUF ¶ 23, E.R. at 160.) Dr. Sussman admits receiving this memoranda, but never responded to it. (SUF ¶ 24, E.R. at 160.)

Sometime around the late evening or early morning of October 3, 1996, the District reneged on its agreement with Mr. DiLoreto and removed all signs from the baseball field fence. (SUF ¶ 29, E.R. at 162.)

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[1] There exists a dispute as to whether Mr. DiLoreto obtained the opinion on his own initiative, or whether he was asked to obtain an opinion by Dr. Sussman as a precondition to posting the sign. However, it appears that this dispute, at least for the present, is an immaterial one.

B. Procedural Background

Mr. DiLoreto filed his complaint on May 2, 1997 in the Superior Court of the State of California for the County of Los Angeles. (E.R. at 1-25.) Respondents removed the action to the United States District Court for the Central District of California and subsequently filed a Motion to Dismiss and a Motion for Sanctions pursuant to Fed. R. Civ. Proc. 11 for filing a "frivolous" lawsuit. (E.R. at 26-28, Docket No. 2.) Mr. DiLoreto opposed the Motion to Dismiss and filed a Motion to Remand for Lack of Subject Matter Jurisdiction. (E.R. at 29-49, Docket No. 3.)

On July 25, 1997, the District Court issued an order remanding the pendent state law claims for lack of subject matter jurisdiction pursuant to the Eleventh Amendment to the U.S. Constitution and retained only Mr. DiLoreto's federal constitutional claims under 42 U.S.C. section 1983. (E.R. at 82-84, Docket No. 10.) Mr. DiLoreto filed a First Amended Complaint with the District Court on August 6, 1997. (E.R. at 805-105, Docket No. 11.)

Mr. DiLoreto moved for summary judgment, which was denied by the district court. The Court then invited respondents to file their own summary judgment motion. (E.R. at 335, Docket No. 26.) Before the district court ruled on respondents' motion, Mr. DiLoreto filed a motion for reconsideration given the Ninth Circuit's opinion in *Doe v. Madison School District No. 321*, 147 F.3d 832 (9th Cir. 1998), *withdrawn, reh'g en banc granted*, 165 F.3d 1265 (9th Cir. 1999), *vacated as moot on reh'g*, 177 F.3d 789 (9th Cir. 1999), which was decided during the pendency of the motion. The district court granted respondents' motion for summary judgment and denied petitioner's motion on the grounds that under the decision of the United States Supreme Court in *Stone v. Graham*, 449 U.S. 39, 101 S. Ct. 192, 66 L. Ed.2d 199 (1980),

the Establishment Clause of the First Amendment to the United States Constitution prohibited the posting of the Ten Commandments on the baseball field fence at Downey High School. (E.R. at 337, Docket No. 39.)

Mr. DiLoreto appealed the order of the District Court to the United States Court of Appeals for the Ninth Circuit. On November 8, 1999 the United States Court of Appeals entered an order affirming in part, and vacating in part the district court's order granting respondents' motion for summary judgment. The Court of Appeals held that because the baseball field fence at Downey High School was a "nonpublic forum" opened for a limited purpose, respondents' refusal to post Mr. DiLoreto's Ten Commandments sign did not violate his right to free speech. *DiLoreto*, 196 F.3d at 967. Because the Court of Appeals held that Mr. DiLoreto's right to free speech had not been violated, it did not reach the issue of whether posting the Ten Commandments on a public high school's baseball field fence violated the Establishment Clause of the First Amendment to the United States Constitution. *DiLoreto*, 196 F.3d at 969. The Court of Appeals also vacated the portion of the District Court's order that held that Mr. DiLoreto's claims were barred under the doctrine of res judicata.[2] *DiLoreto*, 196 F.3d at 964 n.3.

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[2] Likewise, the Los Angeles County Superior Court granted respondents' motion for summary judgment with respect to Mr. DiLoreto's state law claims that were remanded by the District Court on the grounds that posting the Ten Commandments sign would violate the establishment clause of the California Constitution. (CAL. CONST. Art. I, § 4) Mr. DiLoreto appealed this order to the California Court of Appeal, which held that the baseball field fence at Downey High School was a nonpublic forum. However, the three judge panel was divided as to whether posting the Ten Commandments would violate the establishment clause of the California Constitution, and no

VI. ARGUMENT

A. The Decision of the United States Court of Appeals for the Ninth Circuit in this Case Conflicts with Decisions of the United States Court of Appeals for the Second, Third and Seventh Circuits.

The decisions of the United States Court of Appeals for the Ninth Circuit in this case as well as *Children of the Rosary v. City of Phoenix*, 154 F.3d 972 (9th Cir. 1998), *cert denied*, ___ U.S. ___, 119 S. Ct. 1804, 143 L. Ed.2d 1008 (1999) and *Planned Parenthood of Southern Nevada, Inc. v. Clark County School Dist.*, 941 F.2d 817 (9th Cir. 1990), are in conflict with decisions of the United States Court of Appeals for the Second, Third, and Seventh Circuits.

1. The Ninth Circuit's Characterization of the Baseball Field Fence at Downey Field as a Nonpublic Forum Is Inconsistent with Cases from the Second, Third and Seventh Circuits in Which Governments Created Limited Public Forums by Selling Advertising Space on Governmental Facilities.

In the instant action, the Ninth Circuit, relying on its opinion in *Children of the Rosary*, held that the baseball field fence at Downey High School is a "nonpublic forum opened for a limited purpose." *DiLoreto*, 196 F.3d at 967. The characterization of the baseball field fence as a nonpublic forum conflicts with cases from other Circuits which have held on similar facts that opening public property for commercial advertising creates a limited

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majority opinion was formed on the issue. *DiLoreto v. Board of Education*, 74 Cal. App. 4th 267, 87 Cal. Rptr. 791 (1999), *petition for review denied*, (Justice Kennard and Justice Brown dissenting from the denial of the petition for review).

public forum and is subject to constitutional limitations with respect to a public agency's refusal to post controversial messages.

When determining what restrictions that government may place on the use of its property, the cases of the U.S. Supreme Court reflect a "forum based" approach. *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672, 678, 112 S. Ct. 2701, 2705, 120 L. Ed.2d 541 (1992). Restrictions on speech in a public forum that has traditionally been available for public expression are subject to the highest scrutiny; any regulations forbidding such speech must be narrowly drawn to achieve a compelling state interest. *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S. Ct. 948, 955, 74 L. Ed.2d 794 (1983). A second category of public property is a limited public forum, one that the state has opened for expressive activity by part or all of the public. Regulation of a limited public forum is subject to the same restrictions as that governing a traditional public forum. *Perry*, 460 U.S. at 46, 103 S. Ct. at 955. The remaining forum is a non-public forum, which includes all remaining property. In a non public forum, the challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view. *Perry*, 460 U.S. at 46, 103 S. Ct. at 955.

In *Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Transp. Auth.*, 148 F.3d 242 (3d Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S. Ct. 797, 142 L. Ed.2d 659 (1999), the Third Circuit held that a transportation authority created a limited public forum by opening itself up to receive advertising by the public. *Christ's Bride*, 148 F.3d at 251. The speech at issue in *Christ's Bride* were public service announcements in Philadelphia area subway and railway stations that suggested that women who had abortions suffer more and deadlier breast cancer. *Christ's*

Bride, 148 F.3d at 245. In finding that the advertising space was a designated public forum for purposes of the First Amendment, and that the speech at issue fell within the scope of the forum, the Third Circuit reasoned that the goal of the transit authority was to generate income by leasing ad space and that the posters which presented messages concerning abortion and health issues were suitable for the speech for which that particular public forum was created. *Christ's Bride*, 148 F.3d at 251-52.

In *New York Magazine v. Metropolitan Transit Auth.*, 136 F.3d 123, *cert. denied*, ___ U.S. ___, 119 S. Ct. 68, 142 L. Ed.2d 53 (2d Cir. 1998), the Second Circuit also held that New York's transportation authority created a limited public forum by its acceptance of commercial and political advertising. *New York Magazine*, 136 F.3d at 130. At issue in that case were advertisements on New York City buses by New York Magazine that featured the New York Magazine logo and read, "Possibly the only good thing in New York Rudy hasn't taken credit for." *New York Magazine*, 136 F.3d at 125.

In *Planned Parenthood Association/Chicago Area v. Chicago Transit Auth.*, 767 F.2d 1225 (7th Cir. 1985), the Seventh Circuit held that the Chicago Transit Authority ("CTA") had created a public forum by accepting advertisements in buses and transit cars. *Chicago Transit Auth.*, 767 F.2d at 1232. The advertisements at issue involved ads for a planned parenthood organization that "mentioned the availability of counseling about 'prenatal care, abortion, or adoption.' " *Chicago Transit Auth.*, 767 F.2d at 1227.

The opinions of the United States Courts of Appeal in *Christ's Bride*, *New York Magazine*, and *Chicago Transit Authority* from the Second, Third, and Sixth Circuits respectively, holding that a governmental agency creates a limited public forum when it sells advertising space and

may not discriminate against controversial messages, conflicts with the decisions of the Ninth Circuit in *DiLoreto*, *Children of the Rosary*, and *Clark*, which have allowed content-based restrictions on controversial subjects despite the fact that the governmental agencies were involved in selling advertising space.

2. The Ninth Circuit's Decisions in *DiLoreto*, *Children of the Rosary* and *Clark* Cannot Be Reconciled with *Christ's Bride*, *New York Magazine* and *Chicago Transit Authority*.

In *Children of the Rosary*, the Ninth Circuit attempted to distinguish its holding that the City of Phoenix may refuse advertisements in support of a pro-life position on the subject of abortion on municipal buses – despite the fact that it had opened up the forum by selling advertising space – from the decision of the Third Circuit in *Christ's Bride*. In *DiLoreto*, the Ninth Circuit, relying on *Christ's Bride*, attempted to distinguish its holding in this case from *Christ's Bride* and *New York Magazine*. For the reasons set forth below, these attempts by the Ninth Circuit to fashion a distinction in its cases upholding content-based restrictions in what would otherwise be limited public forums are both artificial and unconvincing, and only serve to permit governmental agencies in the Ninth Circuit to discriminate against advertisers whose messages may be unpopular with government officials.

In *Children of the Rosary*, the Ninth Circuit attempted to distinguish that case from *Christ's Bride* in allowing the City of Phoenix to refuse advertisements from an anti-abortion organization in light of the City's interest in maintaining neutrality and preventing a reduction of income earned from selling commercial advertising

space. *Children of the Rosary*, 154 F.3d at 978-79. The advertisements at issue in *Children of the Rosary* stated:

Before I formed you in the womb, I knew you
God
Jeremiah 1:5
CHOOSE LIFE!
Children of the Rosary

Children of the Rosary, 154 F.3d at 975.

In attempting to distinguish its case from *Christ's Bride* and other cases, the Ninth Circuit found that the City of Phoenix had a previous policy of restricting advertising to speech which proposes a commercial transaction, and prohibited advertising which "advocates or proposes a religion." *Children of the Rosary*, 154 F.3d at 975. The Ninth Circuit stated that the agencies involved in *Christ's Bride*, *Chicago Transit Auth.*, and *New York Magazine*, had histories of receiving similar advertisements and had no policies with respect to the acceptance of advertising.

Likewise in an attempt to distinguish *DiLoreto* from the decisions of the Second and Third Circuits, the Ninth Circuit wrote:

> Government policies and practices that historically have allowed commercial advertising, but have excluded political and religious expression, indicate an intent not to designate a public forum for all expressive activity, but reserve it for commercial speech. See *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303-304, 94 S. Ct. 2714, 41 L. Ed.2d 770 (1974) ("[A] city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed on its vehicles.") *Children of the Rosary*, 154 F.3d at 978 (finding no public forum when the city consistently

> enforced policies restricting bus ads to commercial advertising); *New York Magazine v. Metropolitan Transp. Auth.*, 136 F.3d 123, 130 (2d Cir.), *cert. denied*, ___ U.S. ___, 119 S. Ct. 68, 142 L. Ed.2d 53 (1998) ("Disallowing political speech, and allowing commercial speech only, indicates that making money is the main goal.") However, where the government has historically accepted a wide variety of advertising on commercial and non-commercial subjects, courts have found that advertising programs on public property were public fora. See *Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Transportation Auth.*, 148 F.3d 242, 252 (3d Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S. Ct. 797, 142 L. Ed.2d 659 (1999) (finding city's practice of permitting virtually unlimited access to forum created designated public forum); *Planned Parenthood Ass'n v. Chicago Transit Auth.*, 767 F.2d 1225, 1230, 1232 (7th Cir. 1985) (finding public forum given transit authority's history of accepting controversial public issue advertising).

DiLoreto, 196 F.3d at 965-66.

These distinctions, however, are unconvincing for four reasons: (1) the test for determining whether a designated public forum is not whether a governmental agency has restricted similar types of controversial speech based on content in the past, but whether the challenged expression is incompatible with the use to which the facilities have been reserved; (2) allowing a governmental body to exclude a category of speech does not ipso facto render the forum a nonpublic forum because allowing such would permit government to convert a limited public forum into a nonpublic forum by impermissibly excluding speech based on content; (3) the elevation of constitutional protections of commercial

speech over religious or noncommercial speech departs from established Supreme Court jurisprudence; and (4) distinctions between commercial speech and noncommercial speech as a basis for exclusion leads to absurd results.

a. The Test for Determining Whether a Designated Public Forum Was Created Is Whether the Challenged Expression Is Incompatible with the Use to Which the Facilities Have Been Reserved.

As the United States Supreme Court has made clear, "avoidance of controversy is not a valid ground for restricting speech in a public forum. . . . " *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 811, 105 S. Ct. 3439, 3453, 87 L. Ed.2d 567 (1985)). The Ninth Circuit has attempted to fashion a distinction between this case and other cases where a governmental agency has a "history of accepting political ads and a wide variety of controversial public issue ads" to determine whether a designated public forum was created. *DiLoreto*, 196 F.3d at 967. Controversy, however, is not the test to determine whether a designated public forum has been created. The test for determining "whether the government intended to create a designated public forum" is *"the nature of the property and its compatibility with expressive activity."* *DiLoreto*, 196 F.3d at 965 (citing *Cornelius*, 473 U.S. at 802, 105 S. Ct. 3439) (emphasis added).

In holding that the baseball field fence at Downey High School was not a limited public forum, the Ninth Circuit, citing *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 108 S. Ct. 562, 98 L. Ed.2d 592 (1998) stated below:

> We also "examine[ ] the nature of the property and the compatibility with expressive activity to discern the government's intent."

> *Cornelius*, 473 U.S. at 802, 105 S. Ct. 3439. Generally, "school facilities may be deemed to be public forums only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public.' " *Hazelwood*, 484 U.S. at 267, 108 S. Ct. 562 (quoting *Perry*, 460 U.S. at 47, 103 S. Ct. 948). *Hazelwood* constrain[s] the [forum] analysis by requiring that courts focus on unique attributes of the school environment and recognize broadly articulated purposes for which high school facilities may properly be reserved." *Clark*, 941 F.2d at 825 (citing *Hazelwood*, 484 U.S. at 270-73, 108 S. Ct. 562). This takes into account the school's "pedagogical concerns, such as respecting audience maturity, disassociating itself from speech inconsistent with its educational mission and avoiding the appearance of endorsing views, no matter who the speaker is." *Id.* at 827, 108 S. Ct. 562.

DiLoreto, 196 F.3d at 962.

Hazelwood, however, has no application here because in *Hazelwood*, the speech at issue, articles for a high school newspaper which did not meet standards of journalistic professionalism, was incompatible with the pedagogic concerns of a public high school. Judge Norris stated in his dissent in *Clark*:

> Even if the Clark County School District could somehow show that it reserved the ad space for a specific, lawful purpose that narrowed its discretion, it could still escape strict scrutiny. In *Cornelius*, *Perry* and *Hazelwood*, reasonableness review was appropriate *only because the challenged expression was clearly incompatible with the use to which the facilities had been reserved*. . . . This is not the case here. Planned Parenthood's ad is no more incompatible with the school district's purpose in opening up its

> publication to advertisers than "Hair" was incompatible with the municipality's purpose in opening up its theaters for theatrical expression in *Southeastern Promotions*.
>
> Selling advertising served one purpose: to raise money. Planned Parenthood's ad, which would have been paid for like any other, was obviously compatible with that purpose. Moreover, the district does not claim that the ad was inconsistent with written guidelines barring advertisements for products that were unlawful or inappropriate for minors. Planned Parenthood's ad was not illegal and the district makes no claim that it was inappropriate for high school students.

Clark, 941 F.2d at 835-36 (Norris, J., dissenting) (emphasis added). With regard to "respecting audience maturity," and the District "disassociating itself from speech inconsistent with its educational mission," this Court has previously stated in the context of religious speech at public schools:

> We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.

Board of Education of the Westside Community Schools v. Mergens, 496 U.S. 226, 250, 110 S. Ct. 2356, 2372, 110 L. Ed.2d 191 (1990).

In the same way that the expressive use of advertisements on buses and subway stations would not have interfered with providing rail transportation facilities to the public (*Christ's Bride*, 148 F.3d at 250), Mr. DiLoreto's Ten Commandments sign, and the other signs that graced the Downey Field fence would in no way have interfered with the fence's purpose: to mark the outer boundaries of the baseball field. The reasonableness analysis made by

the Ninth Circuit would not be appropriate absent some incompatibility with respect to the speech and the forum for which access is being sought. As the Third Circuit stated:

> The goal of generating income by leasing ad space suggests that the forum may be open to those who pay the requisite fee. SEPTA has specified a few areas in which it will not freely accept advertising: alcohol and tobacco advertising beyond a specified limit and ads deemed libelous or obscene. These restrictions do not apply to CBM posters. Beyond these limitations, there are no specific restrictions on the types of advertising that SEPTA will accept. In effect, SEPTA's reservation of the right to reject any ad for any reason does not conclusively show that it intended to keep the forum closed.

Christ's Bride, 148 F.3d at 251. Likewise, Mr. DiLoreto's Ten Commandments sign was paid for and was accomplishing the goal that the forum was intended to accomplish – until the District discontinued the entire sign program, because of respondents' hostility towards religious expression.

b. A Governmental Body's Decision to Exclude a Category of Speech Does Not Ipso Facto Render the Forum a Nonpublic Forum Because Government Would then Be Permitted to Convert a Forum Into a Nonpublic Forum by Impermissibly Excluding Speech Based on Content.

In *DiLoreto*, the Ninth Circuit distinguished its holding allowing content-based restrictions on speech from cases such as *Christ's Bride* and *New York Magazine* because "District officials excluded certain subjects from

the advertising forum as sensitive or too controversial for the forum's high school context. . . . For example, the District rejected advertisements for alcohol or taverns, as well as Planned Parenthood." The Ninth Circuit also stated that "the fact the District screened for and rejected the ad is evidence that the District intended to create a limited public forum closed to certain subjects, such as religion."[3] *DiLoreto*, 196 F.3d at 967.

The proposition that a governmental body can turn a limited public forum into a nonpublic forum by exercising content-based restrictions on the type of speech

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[3] In *DiLoreto*, the Ninth Circuit stated that "the District's practice of excluding certain subjects from the forum distinguishes this case from *Christ's Bride*, *Chicago Transit Auth.*, and *New York Magazine* on which Mr. DiLoreto relies." *DiLoreto*, 196 F.3d at 967. However, there is no evidence of any written guidelines, much less any formal or informal policy on which types of ads would be excluded. There were no policies with respect to any aspect of the Downey Baseball Boosters sign program and any "purported policy had been contrived for this action." *Chicago Transit Auth.*, 767 F.2d at 1228.

Additionally, the *DiLoreto* court, in an effort to distinguish this case from *Christ's Bride*, attempted to characterize advertisements for the Freemasons as not being religious in nature, and cited Webster's dictionary for the proposition that the Freemasons are "an international fraternal and charitable organization." *DiLoreto*, 196 F.3d at 967. This assertion however, is belied by common knowledge. Freemasonry "recognizes the strong bond which unites all people under one Creator. The masonic fraternity teaches a man to be faithful to his responsibilities to God. Each has a personal belief in a Supreme Being." Grand Lodge of California Website, www.freemason.org. "The mason is instructed that his fraternal obligations involving aid to members are to be subordinated to the duty he owes to God." Encarta Encyclopedia, "Freemasonry," (1998). The Ninth Circuit's distinction is artificial.

allowed is absurd. With respect to the illogical results that such a rule would lead, the Second Circuit stated:

> However, it cannot be true that if the government excludes any category of speech from a forum through a rule or standard, that forum becomes ipso facto a nonpublic forum, such that we would examine the exclusion of the category only for reasonableness. This reasoning would allow every designated public forum to be converted into a nonpublic forum from the moment the government did what is supposed to be impermissible in a designated public forum, which is to exclude speech based on content. See *Cornelius*, 473 U.S. at 813-14, 105 S. Ct. at 3455 (Blackmun, J. dissenting). We cannot interpret the Supreme Court's jurisprudence such that it would eviscerate the Court's own articulation of the standard of scrutiny applicable to a designated public fora.

New York Magazine, 136 F.3d at 129-30. Judge Norris also commented on the perverse results of this distinction employed by the Ninth Circuit to allow content-based restrictions on speech:

> The majority assumes that government officials may create a nonpublic forum and escape strict scrutiny merely by declaring their intent to control content as they see fit. So long as the government reserves for itself broad, better yet, unbridled discretion to censor expression, then it will be deemed to have intended to create a nonpublic forum, and its content-based exclusions will escape strict scrutiny. This so-called public forum test, which finds dispositive whatever public officials say the scope of their censorship authority is, has the perverse effect of limiting judicial scrutiny of exactly the discriminatory, content-based exclusions most suspect under the First Amendment. The Supreme Court

> has never adopted – and in fact, has explicitly rejected – this public forum test, even in the context of public schools.

Clark, 741 F.2d at 831 (Norris, J., dissenting).

Because allowing content-based restrictions on speech in these contexts presents a danger of viewpoint discrimination and contains no standard for guidance as to prohibited and allowable conduct, governmental actors must not be allowed to determine the scope of their own ability to act as censors by making content-based exclusions of speech in a limited public forum. As the Third Circuit stated:

> It contravenes the First Amendment to give government a general license to single out some categories of speech for lesser protection so long as it stops short of viewpoint discrimination.

Christ's Bride, 148 F.3d at 252 n.5.

c. Commercial Speech Cannot Be Meaningfully Distinguished from Non-Commercial Speech without Absurd or Anomalous Results.

The Ninth Circuit's opinions in *DiLoreto* and *Children of the Rosary* have the anomalous result of actually favoring commercial speech over religious speech, and turns this Court's commercial speech jurisprudence on its head. *DiLoreto*, 196 F.3d at 955 ("government policies and practices . . . [which] have allowed commercial advertising, but have excluded political and religious expression . . . indicate an intent . . . to reserve [the forum] for commercial speech"); *Children of the Rosary*, 154 F.3d at 976 ("the city has consistently restricted political and religious advertising"). Further, the realities of the distinctions between offering more protection to commercial speech likewise leads to perverse results.

With respect to the place religious speech occupies in our constitutional system, this Court has stated:

> Our precedent establishes that private religious speech, far from being a first amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. [citations] Indeed, in Anglo American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a *free-speech clause without religion would be Hamlet without the Prince.*

Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 760, 115 S. Ct. 2440, 2446, 132 L. Ed.2d 650 (1995) (emphasis added).

Conversely, this Court has held that commercial speech receives substantially less constitutional protection. *See Bolger v. Youngs Drugs Prods. Corp.*, 463 U.S. 60, 66-67, 103 S. Ct. 2875, 77 L. Ed.2d 469 (1983). In remarking upon the anomalous outcome that the Ninth Circuit's opinion in *Children of the Rosary* resulted, Judge Noonan stated:

> It is something of an anomaly in First Amendment jurisprudence for more protection to be accorded commercial speech than is accorded noncommercial speech. As Justice White has observed, such a result "inverts" the normal rule . . . Moneymaking is not the government's primary business. It would be ironic if pursuit of profit permitted a unit of government to discriminate in the messages on government property.

Children of the Rosary, 154 F.3d at 984 (Noonan, J., dissenting). In both *DiLoreto* and *Children of the Rosary*, those who desire to promote religious messages are placed in a strange position of being forced to characterize their advertisements as commercial to obtain the preferred treatment that such speech is accorded under the Ninth

Circuit's holdings in these two cases. Indeed, in *Children of the Rosary*, in an effort to obtain the preferred treatment that the City of Phoenix was according commercial speech, the Arizona American Civil Liberties Union attempted to characterize the advertisements as commercial by offering the sale of a bumper sticker in the ads. *Children of the Rosary*, 154 F.3d at 975. Ironically, in *Christ's Bride*, the defendants argued that the posters at issue and CBM's message was transformed into commercial speech, and thereby subject to substantially less constitutional protection. *Christ's Bride*, 148 F.3d at 247.

Judge Noonan further demonstrated the anomalous, and discriminatory, results that occur when commercial speech is favored over noncommercial speech:

> Here, the message of a group acknowledging the sacredness of human life in the womb is rejected; Planned Parenthood could run an ad for an abortion clinic. The views clash. The city of Phoenix would give space to one and not the other. Analogously, if Arizona should permit physician-assisted suicide as does Oregon, Dr. Krevorkian could advertise his services on the sides of buses of Phoenix, but the counter advice of advocates offering free counseling against this course would be forbidden. The examples of the great life issues in our present culture speak for themselves. The clash over the environment affords other examples. A power company could extol its product. The Sierra Club, objecting to more dams, would be denied the forum. The makers of a pesticide could celebrate their wares; champions of pesticide-free farms would be barred. A developer could tout the quality of his homes; defenders of green space in the suburbs would have to be silent on the buses. The pornographer could advertise his shop; the defenders of neighborhood decency

> would be denied a reply. In the America of 1998 to give the commercial advertiser space, without reference to the product being pushed, is for a city to take sides more than occasionally on issues of life and health and energy and the ecosystem.

Children of the Rosary, 154 F.3d at 984-85 (Noonan, J., dissenting). Because treating commercial speech more favorably than religious or noncommercial speech leads to anomalous results and departs from established First Amendment jurisprudence of this Court, the petition for certiorari should be granted.

B. Excluding an Advertisement Listing the Ten Commandments from a Public High School Baseball Field Fence Because of its Religious Content Is an Unreasonable Restriction on Speech under the Free Speech Clause of the First Amendment to the United States Constitution Regardless of Whether the School District Created a "Limited Public Forum" or a "Nonpublic Forum."

"In a nonpublic forum opened for a limited purpose, restrictions on access 'can be based on subject matter . . . so long as the distinctions drawn are reasonable in light of the purpose served by the forum.' " *DiLoreto*, 196 F.3d at 967 (quoting *Cornelius*, 473 U.S. at 806, 809, 105 S. Ct. 3439). "The 'reasonableness' analysis focuses on whether the limitation is consistent with preserving the property for the purpose to which it was dedicated." *DiLoreto*, 196 F.3d at 967 (citing *Perry*, 460 U.S. at 50-51, 103 S. Ct. 948). Petitioner recognizes that as a general rule, "[t]here is no question that the District, like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated." *Lamb's Chapel v. Center Moriches Union Free School*

Dist., 508 U.S. 384, 390, 113 S. Ct. 2141, 2145, 124 L. Ed.2d 352 (1993) (failing to rule on the issue of whether the public school classroom was a nonpublic or limited public forum because the regulation at issue was neither reasonable nor viewpoint neutral). However, the exclusion of all religious speech from a nonpublic forum of the type presented by this case is unreasonable.

Respondents unabashedly admit the reason behind their refusal to post Mr. DiLoreto's Ten Commandments sign on an equal basis was because of Establishment Clause concerns. (Answering Brief at 9, 24.) There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech. But this interest is not implicated here. *Capitol Square Rev. & Advisory Bd.*, 515 U.S. at 761-62. On *three previous occasions*, when there was a combination of private religious expression, a forum available for public use, a content-based regulation, and a State's interest in complying with the Establishment Clause, the Supreme Court struck down the restriction on religious content. *Capitol Square Rev. & Advisory Bd.*, 515 U.S. at 762; *Lamb's Chapel*, 508 U.S. at 394-95; *Widmar v. Vincent*, 454 U.S. 263, 271, 102 S. Ct. 269, 275, 70 L. Ed.2d 440 (1981).

The Ninth Circuit has similarly held with respect to placing religious items on public walls in the California Department of Education that it is not reasonable to allow employees to post materials around the office on all sorts of subjects, and forbid only the posting of religious information and materials. *Tucker v. State Bd. of Educ.*, 97 F.3d 1204, 1215 (9th Cir. 1996). The Ninth Circuit has stated:

> The challenged ban not only prevents employees from posting non-controversial information that might interest some or all employees – such as bulletins announcing the time and location of church services, invitations

> to children of employees to join a church youth group, and newspaper clippings praising Billy Graham, Mother Theresa or Cardinal Bernardin – it would also ban religious messages on controversial subjects such as abortion, abstinence of various types, family values, and the v-chip. Material that addresses controversial topics from a non-religious viewpoint would, however, be permissible, as would signs inviting employees to motorcycle rallies, swap meets, x-rated movies, beer busts, burlesque shows, massage parlors or meetings of the local militia. The prohibition is unreasonable not only because it bans a vast amount of material without legitimate justification but also because its sole target is religious speech.

Tucker, 97 F.3d at 1215. With respect to the reasonableness of such a ban on religious speech the Ninth Circuit continued:

> . . . . the sweeping ban on the posting of all religious information would clearly be unreasonable. Reasonable persons are not likely to consider all of the information posted on bulletin boards or walls in government buildings to be government sponsored or endorsed. Certainly a total ban on posting religious information of any kind is an unreasonable means of obviating such a concern.

Tucker, 97 F.3d at 1215.

This court has also prohibited singling out religion or religious viewpoints for discriminatory treatment. "The government may not . . . impose special disabilities on the basis of religious views or religious status." *Employment Division v. Smith*, 494 U.S. 872, 877, 110 S. Ct. 1595, 1599, 108 L. Ed.2d 876 (1990). It has also been observed that "government may not use religion as a basis of classification, for the imposition of duties, penalties, privileges or

benefits." *McDaniel v. Paty*, 435 U.S. 618, 639, 98 S. Ct. 1322, 55 L. Ed.2d 593 (1978) (Brennan, J., joined by Marshall, J., concurring in the judgment).

Here, the Respondents have admitted numerous times that the reason behind their refusal to erect Mr. DiLoreto's Ten Commandments sign was the religious nature of contents of the sign. (Answering Brief at 9, 24; Defendants' Opposing Separate Statement of Controverted/Uncontroverted Material Facts ¶ 30 (E.R. at 195). Not only is this flat ban against religious speech unreasonable, but it is hardly viewpoint neutral. This is because such a ban has the effect of preventing not only messages that discuss religion generally, but also silencing religious perspectives on controversial subjects in general. *Tucker*, 97 F.3d at 1216. The State may not ban all private religious speech, or even discriminate against it, by requiring religious speech alone to disclaim public sponsorship. *Capitol Square Rev. & Advisory Bd.*, 515 U.S. at 769. *See also, Lamb's Chapel*, 508 U.S. at 393 ("permitting school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint" was unconstitutional viewpoint discrimination); *Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788, 812, 105 S. Ct. 3439, 3454, 87 L. Ed.2d 567 (1985) (viewpoint discrimination unreasonable even in a nonpublic forum).

As the ban against religious speech was only applied to Mr. DiLoreto's sign, and no other, and because the district refused to allow the posting of the sign simply because of its religious content, the regulation at issue was neither reasonable nor viewpoint neutral as these terms have been employed by numerous Supreme Court precedents. Such restrictions have been specifically rejected by the Second, Third, and Seventh Circuits. The

special attributes of the baseball field fence are consistent with the access sought by Mr. DiLoreto. There is nothing inherently disruptive about signs (whether religious or not) on the outfield fence of a baseball field.

C. Discrimination by a Public School District in Excluding an Advertisement Listing the Ten Commandments from a Public High School Baseball Field Fence Because of its Religious Content Is Impermissible "Viewpoint-Based" Discrimination.

The distinction between permissible subject matter discrimination or impermissible viewpoint discrimination is a distinction that "is not a precise one." *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 831, 115 S. Ct. 2510, 2517, 132 L. Ed.2d 700 (1995).

Here, the Ten Commandments were singled out because of their religious perspective. Respondents have admitted that the reason for refusing to post Mr. DiLoreto's Ten Commandments sign was the religious nature of the advertisement. (SUF ¶ 40, E.R. at 166.)

As Superintendent Edward Sussman frankly admitted:

> Q: What was your reaction to Mr. DiLoreto offering his services of three attorneys to represent the District should the District be sued in the event of a lawsuit?
>
> A: I asked him to have them contact me, and none ever did.
>
> Q: Why did you ask him to have them contact you?
>
> A: So at least I could, you know, verify the validity of their willingness to do that. One I happen to know personally.
>
> Q: Would you have been willing to place a sign had one of them offered to do so?

A: I would have probably taken it into consideration.

Q: Would you have been willing to place a sign had Mr. DiLoreto agreed to indemnify the District?

A: Probably.

Sussman Depo. at 49:18-50:9. There is simply no space for doubt that the reason Respondents refused to allow Mr. DiLoreto to place a sign of the Ten Commandments was because of the *content* of the message. It is clear that the respondents have some misguided ideas about their responsibilities with respect to the separation of church and state, ideas that have no legal support whatsoever. Instead, respondents chose to violate Petitioner's right to free speech by refusing to post his sign. The record points out that petitioner's sign was refused, before a single sign had actually been posted at Downey Field. (SUF ¶ 38, E.R. at 165.)

As the District allowed others to place advertising signs of their choice, and in fact posted approximately 40 signs after Mr. DiLoreto had been refused his, the record demonstrates that the reason behind refusing Petitioner the same opportunity that had been provided to other merchants in Downey is due to a misguided hypersensitivity to church-state separation.[4]

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[4] In *Tucker*, the Ninth Circuit noted that "an 'open-forum' policy does not confer any 'imprimatur of state approval on religious sects or practices.' " *Tucker*, 97 F.3d at 1212 (quoting *Widmar*, 454 U.S. at 273). This Ninth Circuit also noted in *Tucker* that "there must be a 'plausible fear' that the speech in question would be attributed to the state, and [in *Rosenberger v. Univ. of Virginia*, 515 U.S. 819 (1995)] rejected the Establishment Clause argument because there was 'no real likelihood' that the speech would seem to be 'either endorsed or coerced by the state.' " (*Tucker*, 97 F.3d at 1212 (quoting *Rosenberger*, 515 U.S. at 841-42)).

Even after all the signs from the Baseball Booster Club sign program were removed from Downey Field, advertising signs did in fact remain at the District. At Downey Field, a scoreboard with a Coca-Cola sign was allowed to remain well after the other signs were removed. (SUF ¶ 31, E.R. at 163.) Additionally, advertising signs remained up at Gauldin School, a school in the District and have remained up as late as October 1997. (UMF ¶ 33, E.R. at 163.) These facts evidence an intent to discriminate against Mr. DiLoreto's speech based on either the content or viewpoint of his proposed sign.

In *Cornelius*, this Court stated that "[t]he existence of reasonable grounds for limiting access to a non public forum however, *will not save a regulation that is in reality a facade for viewpoint based discrimination.*" *Cornelius*, 473 U.S. at 811. (Emphasis added.) The *Cornelius* Court never had the occasion to rule on the underlying facts of the case because the trial court never made a finding on the issue of whether there was viewpoint-based discrimination. This is because the Court held that the exclusion was unreasonable. *Cornelius*, 473 U.S. at 811. This Court also made similar statements in an earlier case which indicated that the *intent* behind the discrimination will be a factor in whether a government agency had committed a constitutional violation with respect to the use of a non-public forum. *Perry*, 460 U.S. at 48. The facts present in this case dispositively suggest an improper motive to discriminate on the basis of viewpoint. Petitioner was solicited for the opportunity to purchase an advertising

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This Court has also stated that with respect to fears or conclusions that the speech in question is to be attributed to the state, given an open forum, and private sponsorship, "erroneous conclusions" about the symbolic benefit to religion, "do not count." *Capitol Square Rev. & Advisory Bd.*, 515 U.S. at 765.

sign at the early stages of the Downey Field's sign program. This was before a single sign was posted. Petitioner's proposed artwork was twice rejected by the principal at Downey High School, a decision which was supported by the Superintendent. Approximately one week after receiving a copy of the Attorney General's opinion – that as long as a school district maintained other commercial advertisements it may not permissibly refuse one that depicted the Ten Commandments – the District did remove all the signs from Downey Field. Additionally, each respondent has pointed out that they were aware of what they called "equal access" laws and that they removed the signs in order to save themselves from posting signs which contained viewpoints with which they disagreed. The admissions by respondents of the reasons they removed the signs, and the close proximity with which they were removed after receiving the Attorney General's opinion, strongly evidences an intent to discriminate, and that the removal of all the signs from Downey Field was in reality a facade for viewpoint based discrimination.

VII. CONCLUSION

Because there exists an irreconcilable conflict between the United States Court of Appeals for the Ninth Circuit on one hand, and the Second, Third and Seventh Circuit on the other with respect to whether the government creates a limited public forum when it chooses to sell advertisements – and is thereby restricted by the First Amendment from making content-based exclusions from such a forum, this petition for writ of certiorari should be granted.

The petition should be granted for the additional reason that the Ninth Circuit's holdings in the instant case and *Children of the Rosary* conflicts with the decisions

of this Court and turns this Court's jurisprudence with respect to the level of constitutional protection afforded religious speech and commercial speech on its head.

Finally, the petition should be granted for the additional reason that this case involves important questions involving the First Amendment to the United States Constitution that should be settled by this Court.

DATED: February 7, 2000 Respectfully submitted,

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Edward DILORETO, Plaintiff-Appellant,

v.

DOWNEY UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION; Edward Sussman, individually and in his capacity as superintendent; Betty N. Ferraro, individually and in her official capacity as president; Margo Hoffer, individually and in her official capacity as a member, Downey Unified School District, Board of Education, Defendants-Appellees.

No. 98-56762.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Aug. 4, 1999

Filed Nov. 8, 1999

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Kevin J. Hasson, Washington, DC, for amicus curiae The Becket Fund for Religious Liberty.

Appeal from the United States District Court for the Central District of California Carlos R. Moreno, United States District Judge, Presiding

Before: KOZINSKI and THOMAS, Circuit Judges, and ILLSTON,* District Judge.

ILLSTON, District Judge:

Appellant Edward DiLoreto sued the superintendent of the Downey Unified School District and two members of the Board of Education (collectively "the District") based on the District's refusal to post an advertisement, paid for by Mr. DiLoreto, on Downey High School's baseball field fence. The advertisement contained the text of the Ten Commandments. Mr. DiLoreto contends that the District's refusal to post the advertisement violated his right to free speech under the First Amendment to the United States Constitution. The District raises the defense that posting the sign would have violated the Establishment Clause of the First Amendment and that it feared disruption and controversy that the sign might precipitate. The District Court granted summary judgment to the District, and this appeal followed.

We affirm because we conclude that the baseball field fence was a forum limited to certain subjects and not open for indiscriminate use by the general public. *See Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 267, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988). We hold that the District could exclude subjects from the nonpublic forum that

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* The Honorable Susan Y. Illston, United States District Judge for the Northern District of California, sitting by designation.

would be disruptive to the educational purpose of the school. We also hold that neither the District's refusal to post the sign nor the District's later decision to close the forum to all advertising constituted viewpoint discrimination.

I.

The parties do not dispute the material facts. In September of 1995, Downey High School's Baseball Booster Club ("Booster Club") raised funds by soliciting ads from local businesses. The ads were to be posted on the school's baseball field fence in exchange for a $400 donation. Mr. DiLoreto, Chief Executive Officer of Yale Engineering, purchased an ad and submitted a design containing a lengthy message and listing the Ten Commandments. Mr. DiLoreto subsequently revised his proposal to be less wordy. His final ad proposal read as follows:

For Peace in Our Day!
Pause & Meditate on These Principles
to Live By!

1. I am the Lord your God you shall have no other gods besides me.
2. Take not the name of God in vain.
3. Keep holy the Sabbath Day.
4. Honor your father and your mother.
5. You shall not kill
6. You shall not commit adultery.
7. You shall not steal.

8. You shall not bear false witness.

9. Do not covet your neighbor's wife.

10. Do not covet your neighbor's goods.

To earn respect for ourselves & our community we must do noble acts for the love of God & concern for our country. Edward and Jill Di Loreto Family Trust

Mr. Layne, the principal of Downey High School, declined to post the sign, and defendant Edward Sussman, the district superintendent, ratified that decision. The Booster Club refunded Mr. DiLoreto's donation. The District declined to post the sign based on (1) concern about running afoul of the Establishment Clause; and (2) disruption, controversy and expensive litigation that might arise from community members seeking to remove the sign or from religious or political statements that others might wish to post.

Mr. DiLoreto subsequently sought a legal opinion from the Attorney General of the State of California regarding the legal ramifications of the District's decision not to post the sign. The Attorney General's Office issued an opinion on September 13, 1996, which concluded that refusing to post an otherwise appropriate business advertisement that clearly identified the advertising party and merely incorporated a religious message does not comport with the United States and California Constitutions. 79 Op. Cal. Atty. Gen. 196 (1996). On October 3, 1996, the District discontinued the program and removed approximately forty other signs that had been posted on the

baseball field fence pursuant to paid advertising arrangements with the Booster Club.[1]

The undisputed evidence in the record reflects that the District excluded advertisements from the fundraising program that involved subject matters deemed sensitive and inappropriate in the public secondary school context. For example, the District did not permit advertisements for alcohol or taverns. The District also excluded an ad for Planned Parenthood. Nothing in the record indicates that anything other than commercial advertising was ever permitted on the Downey High School field fence.

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[1] Neither party extensively briefed the question of mootness, although the fact that the District effectively closed the forum by removing the signs raises this issue. A controversy is moot, and therefore nonjusticiable, when it is no longer "ongoing," or where the court is no longer capable of "affect[ing] the rights of litigants in the case before [it]." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990) (quoting *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971)). The Supreme Court has held, however, that "voluntary cessation of allegedly illegal conduct . . . does not make the case moot." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632, 73 S.Ct. 894, 97 L.Ed. 1303 (1953). In a similar situation involving closing a forum, the Seventh Circuit concluded that a live controversy remained. *Sefick v. Gardner*, 164 F.3d 370, 372 (7th Cir.1998), cert. denied, ___ U.S. ___, 119 S.Ct. 2393, 144 L.Ed.2d 794 (1999) ("[The] current no-display policy, adopted after the commencement of this suit, is not implemented by statute or regulation and could be changed again, so . . . voluntary cessation of the challenged conduct does not eliminate the controversy."). Accordingly, we conclude a live controversy continues to exist, and address the parties' arguments on the merits.

On May 2, 1997, Mr. DiLoreto filed a complaint in Los Angeles County Superior Court alleging, inter alia, violation of his rights to free speech under the United States and California Constitutions. The District removed the action to the United States District Court for the Central District of California. The District Court remanded Mr. DiLoreto's claims under the California Constitution, and retained only Mr. DiLoreto's federal constitutional claims under 42 U.S.C. § 1983. In the state court action, the Los Angeles County Superior Court granted the District's motion for summary judgment. On August 19, 1999, during the pendency of this appeal, the California Court of Appeal affirmed, finding that posting the ad would have violated Article I, section 4 of the California Constitution,[2] and that refusing to post the ad did not violate Mr. DiLoreto's free speech rights under Article I, section 2 of the California Constitution. *DiLoreto v. Board of Educ.*, 74 Cal.App.4th 267, 87 Cal.Rptr.2d 791 (1999).

In the federal action, the District Court denied Mr. DiLoreto's motion for summary judgment, and granted the District's motion for summary judgment. The District Court concluded that posting Mr. DiLoreto's sign would have violated the Establishment Clause of the First Amendment to the United States Constitution. The District Court also concluded that refusing to post the sign

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[2] Article I, section 4 of the California Constitution states:

> Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion.

did not violate Mr. DiLoreto's free speech rights because the baseball field was a nonpublic forum, and the District's decision not to post the sign was reasonable as well as viewpoint neutral. Mr. DiLoreto filed a timely notice of appeal.[3]

II.

We review de novo a district court's grant of summary judgment. *Margolis v. Ryan,* 140 F.3d 850, 852 (9th Cir.1998). We must determine, viewing the evidence in the light most favorable to the party opposing the motion, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *See Margolis,* 140 F.3d at 852. When a district court upholds a restriction on speech, the appellate court conducts an independent, de novo examination of the facts. *Tucker v. California Dep't of Educ.,* 97 F.3d 1204, 1209 n. 2 (9th Cir.1996).

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[3] The District Court also held that under the doctrine of res judicata, the judgment in Mr. DiLoreto's state court action barred his federal claims. As Mr. DiLoreto originally brought all claims in one action, and his state and federal actions involve different claims, the doctrine of res judicata does not bar his federal action. *See Nordhorn v. Ladish Co.,* 9 F.3d 1402, 1404 (9th Cir.1993) ("In order to bar a later suit under the doctrine of res judicata, an adjudication must (1) involve the same 'claim' as the later suit, (2) have reached a final judgment on the merits, and (3) involve the same parties or their privies.") (citations omitted). Accordingly, this portion of the District Court's order was in error.

III.

The validity of the District's conduct turns on the nature of the baseball field fence as a forum for expression. The Supreme Court has held that "[t]he existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). The Court employs a forum analysis to evaluate the nature of the property and the corresponding permissible government limitations on expressive activity. *See Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 800, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). "Forum analysis divides government property into three categories: public fora, designated public fora, and nonpublic fora." *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 976 (9th Cir.1998), cert. denied, ___ U.S. ___, 119 S.Ct. 1804, 143 L.Ed.2d 1008 (1999).

A traditional public forum, such as a public park or sidewalk, is a place "that has traditionally been available for public expression." *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678, 112 S.Ct. 2701, 120 L.Ed.2d 541 (1992) (ISKCON). Regulation of speech in a traditional public forum is permissible "only if . . . narrowly drawn to achieve a compelling state interest." *Id.* When the government intentionally opens a nontraditional forum for public discourse it creates a designated public forum. *See Children of the Rosary*, 154 F.3d at 976 (citing *Cornelius*, 473 U.S. at 802, 105 S.Ct. 3439). Restrictions on expressive activity in designated public fora are

subject to the same limitations that govern a traditional public forum. *See ISKCON*, 505 U.S. at 678, 112 S.Ct. 2701.

All remaining public property is classified as nonpublic fora. The government may limit expressive activity in nonpublic fora if the limitation is reasonable and not based on the speaker's viewpoint. *Id.* at 679, 112 S.Ct. 2701. The Supreme Court recently has used the term "limited public forum" to refer to a type of nonpublic forum that the government intentionally has opened to certain groups or to certain topics.[4] In a limited public forum, restrictions that are viewpoint neutral and reasonable in light of the purpose served by the forum are permissible. *See Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995); *Lamb's Chapel v. Center Moriches Union Free Sch.*, 508 U.S. 384, 392-93, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993).

The relevant forum is defined by the access sought by the speaker. *Cornelius*, 473 U.S. at 801, 105 S.Ct. 3439. In this case, the relevant forum is the advertising space

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[4] The contours of the terms "designated public forum" and "limited public forum" have not always been clear. Compare *Widmar v. Vincent*, 454 U.S. 263, 267, 273, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) (discussing designated public forum "generally open for use by student groups") with *Lamb's Chapel v. Center Moriches Union Free School*, 508 U.S. 384, 392-93, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993) (discussing "public property that is not a designated public forum open for indiscriminate public use"); *Rosenberger*, 515 U.S. at 829, 115 S.Ct. 2510 ("The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics.").

on the Downey High School baseball field fence. Mr. DiLoreto contends that the fence was a limited public forum, but it is not clear whether he uses "limited public forum" to refer to a designated public forum subject to heightened scrutiny, or to a type of nonpublic forum that is subject to the reasonableness standard. Mr. DiLoreto concedes in his reply, however, that if the fence is a limited public forum, restrictions on expressive activity are permissible if they are reasonably related to purpose served by the forum and viewpoint neutral. Accordingly, first we must determine whether the fence was a designated public forum subject to heightened scrutiny or a limited public forum subject to the reasonableness standard. Second, we must apply the appropriate standard to the District's actions to determine if they meet constitutional muster.

A.

"The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius*, 473 U.S. at 802, 105 S.Ct. 3439. In determining whether the government intended to create a designated public forum, the Supreme Court has considered the nature of the property and its compatibility with expressive activity, as well as the policy and practices of the government. *See id.; see also Children of the Rosary*, 154 F.3d at 976. The question is whether these factors indicate an intent to designate a public forum dedicated to expressive activities.

Government policies and practices that historically have allowed commercial advertising, but have excluded political and religious expression, indicate an intent not to designate a public forum for all expressive activity, but to reserve it for commercial speech. *See Lehman v. City of Shaker Heights*, 418 U.S. 298, 303-304, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974) ("[A] city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles."); *Children of the Rosary*, 154 F.3d at 978 (finding no public forum when the city consistently enforced policies restricting bus ads to commercial advertising); *New York Magazine v. Metropolitan Transp. Auth.*, 136 F.3d 123, 130 (2d Cir.), cert. denied, ___ U.S. ___, 119 S.Ct. 68, 142 L.Ed.2d 53 (1998) ("Disallowing political speech, and allowing commercial speech only, indicates that making money is the main goal."). However, where the government historically has accepted a wide variety of advertising on commercial and non-commercial subjects, courts have found that advertising programs on public property were public fora. *See Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Transp. Auth.*, 148 F.3d 242, 252 (3d Cir.1998), cert. denied, ___ U.S. ___, 119 S.Ct. 797, 142 L.Ed.2d 659 (1999) (finding city's practice of permitting virtually unlimited access to forum created designated public forum); *Planned Parenthood Ass'n v. Chicago Transit Auth.*, 767 F.2d 1225, 1230, 1232 (7th Cir.1985) (finding public forum given transit authority's history of accepting controversial public issue advertising).

In addition, where the government acts in a proprietary capacity to raise money or to facilitate the conduct of its internal business, the Supreme Court generally has

found a nonpublic forum, subject only to the requirements of reasonableness and viewpoint neutrality. *See Lehman*, 418 U.S. at 303, 94 S.Ct. 2714 ("Here, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce."); *Cornelius*, 473 U.S. at 805-06, 105 S.Ct. 3439 ("[T]he Government has the right to exercise control over access to the federal workplace in order to avoid interruptions to the performance of the duties of its employees."); *see also Planned Parenthood v. Clark County School Dist.*, 941 F.2d 817, 824 (9th Cir.1991) (en banc) ("Nor does the evidence suggest that the high schools were 'motivated by an affirmative desire to provide an open forum' for advertising in athletic programs; the schools did not accept advertising for any purpose other than to help defray the costs of this service." (quoting *Cornelius*, 473 U.S. at 805, 105 S.Ct. 3439)).

We also "examine[ ] the nature of the property and its compatibility with expressive activity to discern the government's intent." *Cornelius*, 473 U.S. at 802, 105 S.Ct. 3439. Generally, "school facilities may be deemed to be public forums only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public.' " *Hazelwood*, 484 U.S. at 267, 108 S.Ct. 562 (quoting Perry, 460 U.S. at 47, 103 S.Ct. 948). *Hazelwood* "constrain[s] the [forum] analysis by requiring that courts focus on unique attributes of the school environment and recognize broadly articulated purposes for which high school facilities may properly be reserved." *Clark*, 941 F.2d at 825 (citing *Hazelwood*, 484 U.S. at 270-73, 108 S.Ct. 562). This takes into account the school's "pedagogical concerns, such as respecting audience maturity,

disassociating itself from speech inconsistent with its educational mission and avoiding the appearance of endorsing views, no matter who the speaker is." *Id.* at 827, 108 S.Ct. 562.

In this case, the District did not intend to designate the baseball field fence as a public forum for expressive activity. The school sold advertising space on the fence to defray athletic program expenses by raising revenue through the Booster Club. As in *Lehman, Children of the Rosary* and *Clark*, the intent of the school in opening the fence to advertising was to raise funds, not to create a forum for unlimited public expression. To raise funds, the District solicited business advertisements, thereby limiting the content of the forum through its solicitation practices. District officials excluded certain subjects from the advertising forum as sensitive or too controversial for the forum's high school context. For example, the District rejected advertisements for alcohol or taverns, as well as an ad for Planned Parenthood. School officials also testified that although they did not personally object to the content of Mr. DiLoreto's ad, they were concerned that allowing the ad would indiscriminately open the forum to all advertisements regarding personal beliefs. Although not dispositive, the fact that the District screened and rejected the ad is evidence that the District intended to create a limited public forum closed to certain subjects, such as religion. *See Cornelius*, 473 U.S. at 805, 105 S.Ct. 3439 ("The decision of the Government to limit access to the [forum] is not dispositive in itself; instead, it is relevant for what it suggests about the Government's intent in creating the forum.") "This type

of selective access does not transform government property into a public forum." *Perry*, 460 U.S. at 47, 103 S.Ct. 948.

The District's practice of excluding certain subjects from the forum distinguishes this case from *Christ's Bride*, *Chicago Transit Auth.*, and *New York Magazine*, on which Mr. DiLoreto relies. In each of those cases, the city or transit authority controlling the bus sign advertisements historically accepted advertisements on a wide variety of subjects. *See Christ's Bride*, 148 F.3d at 251-52 (holding that virtually unlimited access indicated a public forum); *New York Magazine*, 136 F.3d at 130 (noting a history of accepting political advertising); *Chicago Transit Auth.*, 767 F.2d at 1232 (finding a history of accepting political ads and a wide variety of controversial public issue ads indicated a public forum). In contrast, there is no evidence in the record that any political, religious, or controversial public issue advertising was ever permitted on the Downey High School field fence.

The fact that another high school within the District accepted ads for ESP Psychic Readings and the local Freemason organization does not indicate that the Downey High School fence was a designated public forum open to ads promoting personal religious beliefs. The forum is defined by the access sought by the speaker, *see Cornelius*, 473 U.S. at 801, 105 S.Ct. 3439, and Mr. DiLoreto only sought access to the Downey High School field fence. The ESP and Freemason signs appeared in a different forum, and nothing in the record demonstrates that the two advertising programs were the same. In addition, ESP Psychic Readings, which advertised its number as 1-800-PSYCHIC, is a commercial enterprise

and the Freemasons are "an international fraternal and charitable organization." Webster's II New College Dictionary 446 (1995). Neither ad contains a religious, or anti-religious, message, and therefore neither is similar to Mr. DiLoreto's sign.

Under these circumstances, we hold that the baseball field fence was a nonpublic forum open for a limited purpose. Accordingly, the District's conduct need only be reasonable in light of the purpose served by the forum and viewpoint neutral to be permissible. *See Rosenberger,* 515 U.S. at 829, 115 S.Ct. 2510; *Lamb's Chapel,* 508 U.S. at 392-93, 113 S.Ct. 2141.

B.

In a nonpublic forum opened for a limited purpose, restrictions on access "can be based on subject matter . . . so long as the distinctions drawn are reasonable in light of the purpose served by forum" and all the surrounding circumstances. *Cornelius,* 473 U.S. at 806, 809, 105 S.Ct. 3439; *see also Perry,* 460 U.S. at 49, 103 S.Ct. 948. The "reasonableness" analysis focuses on whether the limitation is consistent with preserving the property for the purpose to which it is dedicated. *See Perry,* 460 U.S. at 50-51, 103 S.Ct. 948. For example, in *United States v. Kokinda,* 497 U.S. 720, 727, 110 S.Ct. 3115, 111 L.Ed.2d 571 (1990) (plurality opinion), the Supreme Court held that prohibiting solicitation on postal property was reasonable because the purpose of the forum (a sidewalk from the parking lot to the post office) was to accomplish the most efficient postal delivery system. In *Perry,* the Court held that denying access to the school's internal mail system to

unions other than the school's official bargaining unit was reasonable given the school's purpose to use the mail system for communication of school business, and to prevent the system from becoming a battlefield for competing unions. *Perry*, 460 U.S. at 51-52, 103 S.Ct. 948. In *Lehman*, the Court held that the city's decision to exclude political advertising from bus signs was reasonable given the city's desire to generate revenue and the potential for "lurking doubts about [political] favoritism, and sticky administrative problems . . . in parceling out limited space to eager politicians." *Lehman*, 418 U.S. at 304, 94 S.Ct. 2714 (plurality opinion). Accordingly, even though the actual forum in this case is the advertising space on the fence, the special nature and function of public secondary schools are relevant to evaluating the limits the school may impose on expressive activity. *See Cornelius*, 473 U.S. at 801-02, 105 S.Ct. 3439 (holding that although the forum was the charitable drive itself, the court could consider the special nature and function of the federal workplace in evaluating limits on access).

The District essentially offers two reasons for excluding the subject of religion from the forum. The District's first concern was disruption. The District feared controversy and expensive litigation that might arise from community members seeking to remove the sign or from religious or political statements that others might wish to post. The District's second concern was the potential Establishment Clause violation presented by posting the Ten Commandments in a public high school.

The District's concerns regarding disruption and potential controversy are legitimate reasons for restricting the content of the ads, given the purpose of the forum

and the surrounding circumstances of the public secondary school. *See Cornelius*, 473 U.S. at 810, 105 S.Ct. 3439 (citing *Perry*, 460 U.S. at 52 n. 12, 103 S.Ct. 948) ("[T]he Government need not wait until havoc is wreaked to restrict access to a nonpublic forum."). We held in *Clark* that a public high school's "decision not to promote or sponsor speech . . . which might place it on one side of a controversial issue, is a judgment call which *Hazelwood* reposes in the discretion of school officials and which is afforded substantial deference." *Clark*, 941 F.2d at 829 (citing *Hazelwood*, 484 U.S. at 273 & n. 7, 108 S.Ct. 562). We recognized that a public secondary school has legitimate concerns "such as respecting audience maturity, disassociating itself from speech inconsistent with its educational mission, and avoiding the appearance of endorsing views" that render a school's restriction on advertising reasonable. *Id.*, at 827. Therefore, we concluded that a public secondary school could restrict advertising of controversial topics in programs for high school athletic events, even where the school has created a limited public forum for other advertisements. *See id.* at 829-30. The Supreme Court also has recognized that content-based restrictions may be reasonable "in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience." *Lehman*, 418 U.S. at 304, 94 S.Ct. 2714.

In this case, the testimony of the District officials makes clear their concern that posting Mr. DiLoreto's ad would force the District to open the forum to all expressions of personal beliefs. The school used the athletic field for physical education classes and for school-sponsored sporting events. The District reasonably could have

believed that the controversy and distraction created by political and religious messages raised the potential for disruption of these classes and school-sponsored events, particularly as students at these activities would be a captive audience to the ads. In addition, the District reasonably could have been concerned that the school would be associated with any controversial views expressed in the advertisements on the fence. *See Clark*, 941 F.2d at 827.

Mr. DiLoreto contends that the purpose of the advertising forum was to raise funds for the Booster Club, and that posting his sign would not interfere with that purpose. However, as the California Court of Appeal noted in the parallel California proceeding, even if the District successfully defeated any challenges to the posting of this sign, or others to which the District would have been required to provide equal access, that litigation would have cost the District money, depriving it of the financial benefit the advertising forum was intended to provide. Accordingly, we find that the District's decision to exclude ads on certain subjects, including religion, was reasonable given the District's concerns regarding disruption and controversy.[5]

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[5] The Supreme Court has made clear that the question whether the First Amendment requires a school to tolerate certain speech, such as the speech of students, is different from the question whether the First Amendment requires a school to promote or endorse another's speech. *See Hazelwood*, 484 U.S. at 270-71, 108 S.Ct. 562. Thus the circumstances here are distinguishable from the school's attempt to prohibit student speech in *Tinker v. Des Moines Independent Comm. Sch. Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969).

Since we find the District's decision reasonable on this basis, we do not address its concern over the potential Establishment Clause consequences of posting the ad.

C.

Although the District's decision not to post the ad was reasonable in light of the purpose served by the forum, it may still violate the First Amendment if it discriminates on the basis of viewpoint, rather than content. *See Cornelius,* 473 U.S. at 811, 105 S.Ct. 3439. This distinction "is not a precise one." *Rosenberger,* 515 U.S. at 831, 115 S.Ct. 2510. Permissible content-based restrictions exclude speech based on topic, such as politics or religion, regardless of the particular stand the speaker takes on the topic. *See,* e.g., *Children of the Rosary,* 154 F.3d at 981 (finding that limiting the forum to commercial ads was a permissible content-based restriction). In contrast, impermissible viewpoint discrimination is a form of content discrimination in which the government "targets not subject matter, but particular views taken by speakers on a subject." *Rosenberger,* 515 U.S. at 829, 115 S.Ct. 2510.

Mr. DiLoreto contends that his advertisement was compatible with the purposes of the forum, and that even if the District limited the forum to commercial advertising, his sign was a business advertisement. Nothing in the record, however, indicates that the District opened the forum to the subject of religion. Given the potential for disruption and controversy, the District was justified in excluding that subject from the forum. As the Supreme Court noted in *Perry,*

> [i]mplicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purposes of the property.

Perry, 460 U.S. at 49, 103 S.Ct. 948. Unlike the other signs that were posted on the fence, Mr. DiLoreto's sign does not advertise, or even mention, a business. Mr. DiLoreto's ad was not a statement addressing otherwise-permissible subjects from a religious perspective; it sets forth the Ten Commandments, which are "undeniably a sacred text in the Jewish and Christian faiths," and "concern[ ] the religious duties of believers. . . . " *Stone*, 449 U.S. at 41-42, 101 S.Ct. 192. We conclude that the District's decision not to post Mr. DiLoreto's sign was pursuant to a permissible, content-based limitation on the forum, and not viewpoint discrimination.

We do not accept amicus curiae The Becket Fund for Religious Liberty's view that excluding religion as a subject or category from a forum always constitutes viewpoint discrimination. This argument mischaracterizes the holding in *Rosenberger*, which involved the University of Virginia's decision to withhold payment of printing costs from a student publication that discussed student life from a Christian perspective. The Court merely held that refusing to fund only religious viewpoints on otherwise-permissible subjects (i.e. pregnancy or homosexuality) was viewpoint discrimination. Indeed, the Court explicitly based its decision on the fact that "the University [did] not exclude religion as a subject matter but

select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints." *Rosenberger*, 515 U.S. at 831, 115 S.Ct. 2510; *see also Lamb's Chapel*, 508 U.S. at 393-94, 113 S.Ct. 2141 (holding that permitting presentation of all views regarding family issues except those dealing with the otherwise-permissible subject matter from a religious perspective constituted viewpoint discrimination).

Nor do we believe that the Constitution prohibited the school from closing the forum in response to appellant's ad. The government has an inherent right to control its property, which includes the right to close a previously open forum. *See Capitol Square*, 515 U.S. at 783-84, 115 S.Ct. 2440 ("The fact that the capitol lawn has been the site of public protests and gatherings, and is the location of any number of the government's own unattended displays . . . does not disable the State from closing the square to all privately owned, unattended structures.") (Souter, J., concurring in the judgment); *see also Perry*, 460 U.S. at 46, 103 S.Ct. 948 ("Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum."). Closing the forum is a constitutionally permissible solution to the dilemma caused by concerns about providing equal access while avoiding the appearance of government endorsement of religion. *See Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383, 1394 (11th Cir.1993) (en banc) ("If Georgia fears that it would violate the Establishment Clause by allowing the [religious] display, it can avoid the perception that it is endorsing a religion by . . . closing the [public] forum altogether. . . . "); *see also*

Grossbaum v. Indianapolis-Marion County Bldg. Auth., 100 F.3d 1287, 1290 (7th Cir.1996) (holding that closing a forum to all displays to avoid displaying a religious symbol was not unconstitutional). Accordingly, the fact that the District chose to close the forum rather than post Mr. DiLoreto's advertisement and risk further disruption or litigation does not constitute viewpoint discrimination.

CONCLUSION

We AFFIRM the district court's grant of summary judgment to the appellees on the grounds set forth above. That portion of the district court's order addressing res judicata is VACATED.